



1 alternative, remanding the matter for a new administrative hearing; and  
2 defendant seeks an order affirming the Commissioner's decision. The  
3 Court has taken the parties' Joint Stipulation under submission without  
4 oral argument.

5  
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
7

8 Plaintiff filed her application for a POD and DIB on June 26, 2003,  
9 in which she claims to have been disabled since November 18, 2002.  
10 (A.R. 22, 39, 88-90, 118.) The Commissioner denied plaintiff's claim  
11 initially and upon reconsideration. (A.R. 39-42, 44-48.) Thereafter,  
12 plaintiff timely requested a hearing, and on March 1, 2005, plaintiff,  
13 who was represented by counsel, testified at a hearing before  
14 Administrative Law Judge David J. Agatstein ("ALJ"). (A.R. 49, 593-  
15 648.) On June 1, 2005, the ALJ denied plaintiff's claim (A.R. 22-36),  
16 and the Appeals Council subsequently denied plaintiff's request for  
17 review of that decision (A.R. 6-8).

18  
19 **SUMMARY OF ADMINISTRATIVE DECISION**  
20

21 The ALJ found that plaintiff has met the insured status  
22 requirements of the Social Security Act through December 31, 2008, and  
23 has not engaged in substantial gainful activity since November 18, 2002,  
24 the alleged onset of her disability. (A.R. 34.) Throughout the period  
25 in question, plaintiff was found to be "closely approaching advanced  
26 age." (A.R. 35.)

27  
28 The ALJ found that plaintiff has medically determinable impairments

1 consisting of: bilateral carpal tunnel syndrome (status post releases  
2 on the left in January 2002 and July 2004, and status post releases on  
3 the right in November 2002 and November 2003); a two millimeter disc  
4 bulge of the cervical spine; bilateral shoulder strain/sprain; bilateral  
5 elbow tendonitis; arthritic deformities of the distal interphalangeal  
6 joints of both hands; and obesity. (A.R. 34-35.)

7  
8 In setting forth plaintiff's residual functional capacity, the ALJ  
9 relied upon the opinion of the non-examining medical expert and found  
10 that plaintiff can lift and/or carry 20 pounds occasionally, 10 pounds  
11 frequently, stand and/or walk for six out of eight hours, and sit for  
12 six hours in an eight-hour workday; she can occasionally (up to 1/3 of the  
13 work day) grasp and finger, and she cannot elevate her upper extremities  
14 above shoulder level. (A.R. 35.) Based on this residual functional  
15 capacity assessment and the testimony of a vocational expert, the ALJ  
16 found that plaintiff is unable to perform her past relevant work as a  
17 school secretary or bookkeeper, but she has transferable skills to  
18 perform one semi-skilled sedentary occupation: clerical information  
19 clerk. (*Id.*) Accordingly, the ALJ concluded that plaintiff was not  
20 disabled within the meaning of the Social Security Act during the time  
21 period at issue. (A.R. 18.)

#### 22 23 STANDARD OF REVIEW

24  
25 This Court reviews the Commissioner's decision to determine  
26 whether it is free from legal error and supported by substantial  
27 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The  
28 Commissioner's decision must stand if it is supported by substantial

1 evidence and applies the appropriate legal standards. Saelee v. Chater,  
2 94 F.3d 520, 521 (9th Cir. 1996). Substantial evidence is "more than a  
3 mere scintilla but less than a preponderance -- it is such relevant  
4 evidence that a reasonable mind might accept as adequate to support the  
5 conclusion." Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995).

6  
7 Although this Court cannot substitute its discretion for that of  
8 the Commissioner, this Court nonetheless must review the record as a  
9 whole, "weighing both the evidence that supports and the evidence that  
10 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of  
11 Health and Human Serv., 846 F.2d 573, 576 (9th Cir. 1988); see also  
12 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
13 responsible for determining credibility, resolving conflicts in medical  
14 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
15 1035, 1039-40 (9th Cir. 1995). This Court must uphold the  
16 Commissioner's decision if it is supported by substantial evidence and  
17 free from legal error, even when the record reasonably supports more  
18 than one rational interpretation of the evidence. *Id.* at 1041; see also  
19 Morgan v. Commiss'r. of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th  
20 Cir. 1999); Flaten v. Sec'y., 44 F.3d 1453, 1457 (9th Cir. 1995).

## 21 22 DISCUSSION

23  
24 Plaintiff alleges the following two issues: (1) whether the ALJ  
25 properly evaluated plaintiff's residual functional capacity with respect  
26 to her manipulative limitations; and (2) whether the ALJ identified a  
27 significant range of work within plaintiff's residual functional  
28 capacity. (Joint Stipulation "Joint Stip." at 3.) The Court addresses

1 each of these two issues below, although not in the precise manner in  
2 which they were presented.

3  
4 **I. The ALJ Failed To Provide Specific And Legitimate Reasons For**  
5 **Disregarding The Opinion Of Plaintiff's Treating Physician**  
6 **Regarding Plaintiff's Manipulative Limitations.**

7  
8 The greatest weight is accorded to the opinions of a claimant's  
9 treating physician because, "the treating physician is hired to cure and  
10 has a better opportunity to know and observe the claimant as an  
11 individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).  
12 When, as in this case, an ALJ elects to disregard the medical findings  
13 of treating physicians, he must set forth "specific, legitimate reasons  
14 for doing so that are based on substantial evidence in the record." *Id.*  
15 An ALJ's failure to provide such reasons is reversible error. Winans v.  
16 Bowen, 853 F.2d 643, 647 (9th Cir. 1987); see also Smolen, 80 F.3d at  
17 1282; Cotten v. Bowen, 799 F.2d 1403, 1408-09 (9th Cir. 1987).  
18 Moreover, the opinion of a specialist about medical issues related to  
19 his area of specialization are given more weight than the opinion of a  
20 non-specialist. Smolen, 80 F.3d at 1285 (citing 20 C.F.R. §  
21 404.1527(d)(5)).

22  
23 Dennis Ainbinder, M.D., plaintiff's treating orthopedic surgeon,  
24 opined that plaintiff can use each hand for grasping, twisting, and  
25 turning objects for only 20 percent of an eight-hour workday. (A.R. 28,  
26 518.) He similarly opined that plaintiff can use each hand for fine  
27 manipulation for only 20 percent of an eight-hour workday, and she can  
28 use each arm for reaching for only 20 percent of an eight-hour workday.

1 (*Id.*) At the hearing, Harvey Alpern, M.D., an internist who acted as a  
2 non-examining medical expert in this case, testified, based only upon  
3 his review of the medical evidence, that plaintiff can "occasionally (up  
4 to 1/3 of the work day) grasp and finger, and she cannot elevate her upper  
5 extremities above shoulder level." (A.R. 28, 621.) Critically, taking  
6 both physicians' opinions into account, the vocational expert testified  
7 that with the limitations described by Dr. Ainbinder, no jobs exist that  
8 plaintiff could perform, but with the residual functional capacity  
9 described by Dr. Alpern, one job exists that plaintiff could perform.

10  
11 As the ALJ clearly and correctly observed: "[i]n the present case,  
12 there is no objective test to determine whether the claimant's  
13 manipulative limitations are 20 percent or 33 1/3 percent; both numbers are  
14 estimates and, mathematically, relatively close. The testimony of the  
15 vocational expert suggests, however, that the difference is  
16 dispositive." (A.R. 29.) The ALJ rejected the opinion of Dr. Ainbinder  
17 and accepted, instead, the opinion of Dr. Alpern, for reasons that may  
18 be specific, but are neither legitimate nor persuasive.

19  
20 First, while acknowledging that "Dr. Ainbinder's opinion would  
21 generally be controlling" in this case, the ALJ indicates that he is  
22 "persuaded" to adopt "Dr. Alpern's overview of the case, from his  
23 vantage point of a medical expert *sworn to impartiality.*" (A.R. 29;  
24 emphasis added.) As plaintiff's counsel correctly points out, there is  
25 no evidence to suggest a lack of impartiality or any impropriety on the  
26 part of Dr. Ainbinder. (Joint Stip. at 5.) It is well-settled that  
27 "[t]he purpose for which medical reports are obtained does not provide  
28 a legitimate basis for rejecting them. An examining doctor's findings

1 are entitled to no less weight when the examination is procured by the  
2 claimant than when it is obtained by the Commissioner." Lester v.  
3 Chater, 81 F.3d 821, 832 (9th Cir. 1995). Indeed, "[t]he Secretary may  
4 not assume that doctors routinely lie in order to help their patients  
5 collect disability benefits.'" *Id.* (citation omitted)

6  
7 Second, the ALJ finds Dr. Alpern's assessment of plaintiff's  
8 limitations to be "fundamentally correct, on its face and in its  
9 implications." (A.R. 29.) However, in crediting Dr. Alpern's opinion  
10 over that of Dr. Ainbinder, the ALJ only focuses on the testimony of Dr.  
11 Alpern on direct examination, in which he limited plaintiff's use of her  
12 hands to 33⅓ percent of the day. The ALJ makes no reference whatsoever  
13 to Dr. Alpern's testimony on cross-examination in which he conceded,  
14 without qualification, that Dr. Ainbinder's opinion, limiting  
15 plaintiff's use of her hands to 20 percent of the work day, is  
16 "reasonable." (A.R. 630.) In fact, Dr. Alpern testified that there was  
17 "not a great deal of difference" between his opinion and Dr. Ainbinder's  
18 opinion with respect to plaintiff's manipulative limitations. (A.R.  
19 631.) In view of Dr. Alpern's testimony on cross-examination regarding  
20 the reasonableness of Dr. Ainbinder's opinion, Dr. Alpern's testimony  
21 regarding the critical degree of limitation in plaintiff's ability to  
22 engage in hand manipulations is equivocal at best. Thus, the ALJ should  
23 have given Dr. Ainbinder's "reasonable" opinion controlling weight in  
24 determining plaintiff's residual functional capacity.<sup>2</sup>

25  
26 <sup>2</sup> The ALJ's extended discussion of his purportedly "specific and  
27 legitimate considerations" (A.R. 29-30) for adopting Dr. Alpern's  
28 opinion over that of Dr. Ainbinder involves an evaluation of plaintiff's  
treatment records and of opinions rendered by various physicians, at  
different times, regarding her medical condition and limitations. Dr.

1 Although the ALJ correctly states that, "[w]hen there are conflicts  
2 in evidence provided by equally qualified physicians, the Administrative  
3 Law Judge is called upon to weigh the evidence in order to come to a  
4 conclusion about whether a claimant is disabled," the physicians in this  
5 case are not "equally qualified." (A.R. 28.) Plaintiff's treating  
6 physician is an orthopedic specialist who has been treating plaintiff  
7 since 2003, whereas the testifying medical expert is merely an internist  
8 who never examined plaintiff and based his opinion solely upon the  
9 medical record. Had the ALJ properly evaluated the physicians'  
10 opinions, in accordance with the appropriate legal standards, the ALJ  
11 would have necessarily adopted Dr. Ainbinder's opinion as to plaintiff's  
12 limitations -- an opinion that the non-examining medical expert found to  
13 be "reasonable" -- and, therefore, would have found plaintiff to be  
14 "disabled."

15  
16 Accordingly, the ALJ's acceptance of Dr. Alpern's equivocal opinion  
17 over the medically reasonable opinion of Dr. Ainbinder, plaintiff's  
18 treating specialist, constitutes reversible error.

19  
20 Alpern, who based his opinion on a review of the same records and  
21 opinions and unhesitatingly testified that Dr. Ainbinder's opinion is  
22 "reasonable," is more qualified to evaluate such documents than the ALJ,  
23 who is not medically trained and apparently reached a different  
24 conclusion from that of the medical expert regarding the reasonableness  
25 of Dr. Ainbinder's assessment of plaintiff's limitations. Indeed, the  
26 ALJ may not substitute his judgment regarding medical issues for that of  
27 trained physicians. See Tackett v. Apfel, 180 F.3d 1094, 1102 (9th Cir.  
28 1999)(ALJ may not substitute his own diagnosis for that of the  
physicians.); Attia v. Astrue, 2007 WL 2802006 (E.D. Cal. Sept. 24,  
2007)("It does not appear that the ALJ is competent to substitute his  
own opinion for findings and conclusions of a physician."); see also  
Clifford v. Apfel, 227 F.3d 863, 870 (7th Cir. 2000)("We have likewise  
insisted that an ALJ must not substitute his own judgment for a  
physician's opinion without relying on other medical evidence and  
authority in the record"; and further noting that an ALJ cannot "play  
doctor" and make independent medical findings).



1 **II. The ALJ Failed To Identify A "Significant Range Of Work" Within**  
2 **Plaintiff's Residual Functional Capacity.**

3  
4 Assuming, *arguendo*, that plaintiff could use her hands for up to  
5 33 $\frac{1}{3}$  percent, rather than 20 percent, of the day, the vocational expert  
6 testified that such an individual has transferrable skills to perform  
7 only one semi-skilled, sedentary occupation: clerical information  
8 clerk. (A.R. 637.) However, under Ninth Circuit precedent, the  
9 identification of only one alternate, semi-skilled occupation fails to  
10 demonstrate adequately that plaintiff could perform a "significant  
11 range" of other semi-skilled work.  
12

13 In Lounsbury v. Barnhart, 468 F.3d 1111 (9th Cir. 2006), the ALJ  
14 found that Lounsbury was "not-disabled," because she could perform one  
15 alternate, semi-skilled occupation. On appeal, however, the Ninth  
16 Circuit determined that Lounsbury was disabled, because "[o]ne  
17 occupation does not constitute a significant range of work." *Id.* at  
18 1117. Although the factual situation in Lounsbury does not precisely  
19 align with the facts presented in this case,<sup>3</sup> the Ninth Circuit  
20 nonetheless interpreted and defined the phrase "range of work" in the  
21 context of determining a plaintiff's ability to perform "other work."  
22

23 In Lounsbury, the Ninth Circuit stated that "the specific issue we  
24 confront is the meaning of the phrase 'significant range of work.'" 468  
25

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26 <sup>3</sup> In Lounsbury, the plaintiff was of "advanced age" during the  
27 period in question and, as such, the Court applied grid rule 202.00.  
28 Plaintiff acknowledges that grid rule 202.00 is inapplicable in this  
case, but relies upon the Lounsbury Court's analysis regarding its  
interpretation of the phrase "significant range of work."

1 F.3d at 1117. The Court opined that "[t]o interpret 'significant range  
2 of . . . work' to mean simply 'work' nullifies the concept of 'range'  
3 contained in the text. Congress might have drafted Rule 202.00(c) to  
4 require only a 'significant number of jobs'; it chose not to do so."  
5 *Id.* The Ninth Circuit opined that the term "work" means "distinct  
6 *occupations*," as opposed to "individual *jobs*," and the term "significant  
7 numbers" is no substitute for and cannot satisfy the requirement of a  
8 "significant range of . . . work." (*Id.*; emphasis in original.)  
9

10 The record in Lounsbury, as in the present case, established that  
11 the claimant's skills would transfer to precisely one occupation at her  
12 residual functional capacity. As in Lounsbury, the ALJ's reliance on  
13 plaintiff's ability to perform only one job to support the ALJ's  
14 conclusion that plaintiff was "not disabled" is misplaced. Thus, even  
15 if plaintiff's use of her hands is limited to 33⅓ percent of the work  
16 day, the identification of only one job is insufficient to support a  
17 finding of "not disabled" within the meaning of a "significant range of  
18 jobs" as defined under Ninth Circuit precedent.  
19

### 20 **III. Payment Of Benefits Is Required.**

21

22 The final question is whether to remand for further administrative  
23 proceedings or whether a reversal and remand for payment of benefits is  
24 required. The decision whether to remand for further proceeding is  
25 within the discretion of the Court. Harman v. Apfel, 211 F.3d 1172,  
26 1175-1178 (9th Cir. 2000) However, where a remand would simply delay  
27 payment of benefits or where no useful purpose would be served by  
28 further administrative proceedings, it is appropriate to exercise this

1 discretion to direct an immediate award of benefits. Harman, 211 F.3d  
2 at 1179.

3  
4 It is well-settled that the court will credit the evidence, reverse  
5 and remand for an award of benefits, where: (1) the ALJ has failed to  
6 provide legally sufficient reasons for rejecting such evidence; (2)  
7 there are no outstanding issues that must be resolved before a  
8 determination of disability can be made; and (3) it is clear from the  
9 record that the ALJ would be required to find the claimant disabled were  
10 such evidence credited. Smolen, 80 F.3d at 1292. See Lester, 81 F.3d  
11 at 834 (where the Commissioner fails to provide adequate reasons for  
12 rejecting the opinion of a treating or examining physician, the opinion  
13 is credited as a matter of law)(citation omitted).

14  
15 In the present case, all three of the above conditions are  
16 satisfied. The record here is fully developed, and there are no  
17 outstanding factual issues. The ALJ discredited the opinion of  
18 plaintiff's treating orthopedic surgeon in a manner contrary to  
19 controlling Ninth Circuit precedent, and had he given the proper weight  
20 to the treating physician's opinion, a finding of disability would have  
21 been required. Further, regardless of the ALJ's improper rejection of  
22 the treating physician's opinion, the ALJ failed to identify a  
23 "significant range of work," that plaintiff could perform. Accordingly,  
24 the Commissioner failed to meet his burden at Step Five. Thus, as there  
25 is no legitimate reason for further administrative proceedings or delay,  
26 this case should be reversed and remanded for the payment of benefits.

27 ///

28 ///

**CONCLUSION**

Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the Commissioner is REVERSED, and this case is REMANDED for the immediate calculation and payment of benefits in accordance with this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED: March 12, 2008

\_\_\_\_\_/s/  
MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE